United States District Court
District of New Jersey
United States Court House
Camden, New Jersey 08101-0566

Chambers of
JOHN F. GERRY
Chief Judge

September 14, 1990

TO ALL COUNSEL OF RECORD:

LETTER OPINION

Re: United States of America, et al v. Rohm and Haas, et al v. John Cucinotta, et al
Civil Action No. 85-4386

Dear Counsel:

The court approved a Partial Consent Decree (Decree) between the United States, the State of New Jersey and ten *de minimis* defendants on September 29, 1989.[1] Subject to reopeners, the Decree settled the claims of the United States and the New Jersey Department of Environmental Protection (NJDEP) against the ten

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1. The *de minimis* settlors are: Triangle Publications, Inc., E.I. DuPont de Nemours and Co., Inc., Hercules, Inc., the Gilbert Spruance Company, Owens-Corning Fiberglas Corp., SPS Technologies, Inc., Betz Industries, Inc., CBS, Inc., the Glidden Company and Allied Paper Company.

settling *de minimis* parties, pursuant to Section 122(g) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9622(g). *See United States v. Rohm and Haas Co.*, 721 F. Supp. 666 (D.N.J. 1989).

The ten *de minimis* settlors now move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss all crossclaims and counterclaims against them, and to be dismissed as parties in this action. The United States does not oppose the motions, provided that the dismissals are conditioned upon the reopeners specified in t he Partial Consent Decree. The moving defendants agree that the dismissals should be so conditioned. Non-settling defendants Rohm and Haas and Manor Health Care (Manor) oppose the motions to dismiss for several reasons, which we treat with below.

There are three categories of crossclaims and/or counterclaims still pending against the *de minimis* settlors: 1) contribution claims brought pursuant to section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1); 2) contribution claims brought pursuant to the Uniform Contribution Among Joint Tortfeasors Act, N.J.S.A. § 2A:52A-3 *et seq.*; and 3) common law indemnification claims.[2]

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2. Non-settling defendants' indemnification claims rise or fall with their contribution claims. It would be illogical to permit a claim for indemnification to go forward when contribution claims are barred. A party precluded from seeking reimbursement for *part* of its costs in the posture of a contribution claim, must a fortiori be barred from recovering *all* its costs through indemnification. To permit claims for indemnification where contribution claims are barred would undermine the protection against contribution. *See United States v. Cannons Engineering Corp.*, 899 F.2d 79, 92 (1st Cir. 1990) ("Although CERCLA is silent regarding indemnification, we refuse to read into the

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For the reasons that follow we will grant the settlors motions and dismiss all claims brought against them by the non-settlors in this action, and dismiss them as parties, all dismissals subject to the reopeners in the Decree.

I. DISCUSSION

a. Standard for Dismissing Claims

A claim should be dismissed under Rule 12(b)(6) when "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957). The moving defendants argue that sections 113(f)(2) and 122(g) of CERCLA, and the terms of the Decree mandate dismissal of contribution and indemnification claims brought against them by the non-settling defendants.

b. Relevant Statutory Sections Barring Contribution Claims

Two sections of CERCLA bar claims for contribution against a settlor "regarding matters addressed in the settlement" when the settlor has "resolved its liability" to the Government in the settlement.

2.(...continued)

statute a right to indemnification that would eviscerate § 9613(f)(2) and allow non-settlors to make an end run around the statutory scheme."); *Central Ill. Public Serv. v. Indus. Oil Tank*, 730 F. Supp. 1498, 1507 (W.D. Mo. 1990) ("Failure to provide similar protection against suits for equitable indemnity would encourage defendants to re-cast their contribution claims as indemnity claims and injure, if not destroy, the goals to be served by the express contribution protection provisions of CERCLA."). We will therefore dismiss non-settling defendants' claims for indemnification against the *de minimis* settlors.

Section 113(f)(2) applies to settlements in general and provides, in relevant part:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.

42 U.S.C. § 9613(f)(2).

Section 122(g)(5) applies specifically to the effect of a *de minimis* settlement upon contribution rights of non-settlors. In relevant part section 122(g)(5) provides:

> A party who has *resolved its liability* to the United States under this subsection shall not be liable for claims for contribution *regarding matters addressed in the settlement.*

42 U.S.C. § 9622(g)(5) (emphasis added).

Thus the two questions that arise from the statute are: 1) Have the *de minimis* settlors "resolved [their] liability" to the United States and New Jersey by entering into the Partial Consent Decree? 2) Do the claims sought to be dismissed address "Covered Matters" under the Decree? If the settlors have resolved their liability to the two governments and the claims sought to be dismissed involve "Covered Matters," then the settlors are entitled to dismissals, subject to the reopeners in the Decree.

c. Terms of the Partial Consent Decree

1. Contribution Claims Barred

Subject to the reopeners in the Decree (discussed below),

> the United States and [New Jersey] agree that by entering into and carrying out the terms of the Partial Consent Decree, each De Minimis Defendant will have resolved its liability to the United States and [New Jersey] pursuant to Sections 113(f) and 122(g) of CERCLA, and shall not be liable for claims for contribution for Covered Matters.

Id., § VII, p. 9. Thus the Decree bars claims for contribution against the settlors for "Covered Matters" pursuant to the two CERCLA sections quoted above, and states that each settlor "will have resolved its liability" to the governments by entering into and fulfilling the terms of the Decree. The remaining question is whether the counterclaims and crossclaims asserted by non-settling defendants involve "Covered Matters."

2. "Covered Matters"

By the terms of sections 113(f)(2) and 122(g)(5) of CERCLA and the Decree itself, no claims for contribution may be brought against the *de minimis* settlors that arise from "Covered Matters." The Decree defines "Covered Matters" to include:

> (a) any potential civil liability pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973, with regard to the Site; (b) any and all civil liability for reimbursement of response costs or for injunctive relief pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. Sections 9606 or 9607(a), the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.1 *et seq.* ("Spill Act"), the Water Pollution Control Act,

> N.J.S.A. 58:10A-1 *et seq.* ("WPCA"), and any other State statutory and State common law with regard to the site; and (c) all civil liability relating to past or future injury to, destruction to or loss of natural resources within the meaning of CERCLA, 42 U.S.C. Section 9601 *et seq.*, under the jurisdiction of the United States Department of Interior or the State [of New Jersey] arising out of or related to the release or threatened release of hazardous substances at or near the Site.

Id., § V, pp. 6-7. The "Covered Matters" in the Decree are comprehensive. There are no grounds excepted upon which the non-settling defendants could assert claims for contribution regarding remediation at the Site.

3. The Reopeners

Section VI of the Decree provides that upon the occurrence of specified contingencies, "the United States, [New Jersey] or any other party to this action [may] seek or obtain further relief, including reimbursement of costs, contribution or indemnity, from a De Minimis Defendant." *Id.*, pp. 8-9.

The first contingency is the discovery of

> information not currently known by the United States . . . which shows: (A) that the amount of hazardous substances contributed by that De Minimis Defendant, if any, to the Site, disproportionately contributes to the cumulative toxic or other hazardous effects of such substances at the Site; (B) the toxic or other hazardous effect of such substances is not minimal in comparison to the effects of other hazardous substances contributed to the Site; or (C) that the particular

> De Minimis Defendant has contributed more than 1% of the total volume of hazardous substances disposed of at the Site.

Id., p. 8.

The second contingency is, "if the total costs incurred, excluding natural resource damages, by the United States and the State [of New Jersey] in responding to the release and threatened release of hazardous substances at or in connection with the Site exceed $94,000,000." *Id.*, p. 9.

d. Rohm and Haas and Manor Arguments

Rohm and Haas and Manor oppose the motions to dismiss on several grounds. Rohm and Haas argues that the Decree "does not resolve all claims against these *de minimis* settlors," so that they are not entitled to obtain dismissal pursuant to Rule 12(b)(6). Rohm and Haas Memorandum at p. 2.

1. Contribution Claims

Rohm and Haas concedes that "the Decree entitles the settlors to the benefit of the contribution protection in CERCLA, §§ 113(f)(2) and 122(g)(5) . . . [but] only for 'matters addressed in the settlement.'" Rohm and Haas Memo at 6.

Although there is no controlling precedent in this circuit, courts have barred contribution claims in similar circumstances. In *Cannons Engineering*, the First Circuit affirmed the district court's dismissal of non-settlors' contribution claims against the *de minimis* settlors.

> Congress plainly intended non-settlors to have no contribution rights against settlors regarding matters addressed in [the] settlement. Thus, the cross-claims [for

> contribution] were properly dismissed; Congress [intended] that all who choose not to settle confront the same sticky wicket of which [the non-settlors] complain.

899 F.2d at 92. We find *Cannons* persuasive and in accord with the clear language of the statute and the Decree, all of which support the requested dismissals of contribution (and thus indemnification) claims as to "Covered Matters."

A. Effect of the Reopeners

Despite conceding the bar against contribution claims against the *de minimis* settlors for "Covered Matters"—here, *all* possible claims—Rohm and Haas argues that since the reopeners create the possibility that claims could be made in the future against the *de minimis* settlors, the Decree thus "does not resolve all claims against" them, and therefore dismissals are inappropriate.

As Rohm and Haas correctly points out, "[t]hese 'reopeners' allow the United States, the State of New Jersey and any other party to the action to assert claims *in this court* upon the occurrence of either reopener event." Rohm and Haas Memo at 4 (emphasis in original). Both Rohm and Haas and Manor argue that because of the reopeners, "the settlors are not entitled to be dismissed as parties to the action, but should be required to remain subject to this Court's jurisdiction for the purpose of any future enforcement or interpretation of the Consent Decree." Rohm and Haas Memo at 5; Manor Brief at 1.[3]

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3. The revised order sought by moving defendants and concurred in by plaintiff United States is practically the same as the position taken by Rohm and Haas. Under the revised order, "any and all crossclaims and/or counterclaims asserted or to be asserted against Defendants are

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(1) The $94,000,000 Remediation Costs Reopener

Rohm and Haas and Manor both argue that the recent $125 million estimate of remedial costs at the Lipari Landfill should affect the determination of defendants' motions. Rohm and Haas would have the court "at least take notice" of the May 8, 1990 letter from counsel for the United States to Magistrate Jerome B. Simandle setting forth the revised estimate. Rohm and Haas Memo at 5 and Exh. A.

Manor urges further that the estimate itself satisfies the requirement in the second reopener that "the total costs incurred . . . exceed $94,000,000." Manor Brief at 2.

> It must be remembered that the United States has contracted to have the remedial work performed and a contractor has begun the work. The contractual promise to pay is a cost "incurred" when the promise was made . . . . The reopener provision makes the *de minimis* settlors potentially liable for the costs that the United States has contracted to incur for the Lipari remediation.

Id. Manor relies on *Standard Oil of Ohio v. FEA*, 612 F.2d 1291, 1297 n.5 (T.E.C.A. 1979), for the proposition that because plaintiff has entered into a contract to have the remedial work performed, the government, like Sohio, "incurred a cost upon signing the

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hereby dismissed with prejudice as to matters covered by the Partial Consent Decree and Defendants are hereby dismissed as parties from this action *subject to the reopener provisions contained in the Partial Consent Decree*." Form of Order, Exh. B, Reply Memo of Moving Defendants (emphasis added).

contracts, for it then became liable to pay . . . regardless of price." Manor Brief at 2, *quoting Standard Oil*, 612 F.2d 1297 n.5.

The *Standard Oil* case involved review of accounting methods for when a cost could properly be said to have been "incurred" on a specific quantity of oil Sohio had contracted to buy. Here, there is no issue that the Government has already incurred *some* costs at the Lipari Landfill. Rather, for purposes of the reopener, the question is whether the costs that have been incurred exceed $94,000,000. Although the Government has contracted to have the remedial work done, at an estimate now of $125 million, the work that will need to be done remains of uncertain extent, duration and cost. The reopener addresses the threshold moment when $94,000,000 in costs *have been incurred*, not the moment when the estimate of what costs *will be incurred* exceeds $94,000,000.

The Government agrees. In its June 1, 1990 status report to Magistrate Simandle on the estimated costs to remediate the Lipari Landfill, the Government wrote: "Although the estimate to remediate the Landfill now exceeds that [reopener] amount, the simple fact is that the United States has not yet incurred more than $94,000,000 in costs and may never incur more than that sum." *Id.* at 1. We therefore reject Manor's position.

2. Other Arguments

Rohm and Haas argues that movants cannot meet their Rule 12(b)(6) burden under *Conley v. Gibson*, of showing that it is "beyond doubt that the plaintiff[s] can prove no set of facts which would entitle [them] to relief," 355 U.S. at 45-46, since the reopeners present the possibility that movants may later be found liable. Rohm and Haas Memo at 6. However, since the revised order sought by movants dismisses the *de minimis* settlors "subject

to the reopener provisions contained in the Partial Consent Decree," what relief might be obtainable against movants under the reopeners does not affect dismissals granted subject to those reopeners.

To obtain dismissals movants need only show that no relief could be obtained against them for "Covered Matters" under the Decree, and that there are no grounds for relief other than those specified as "Covered Matters." Since the "Covered Matters" defined in the Decree are comprehensive, excluding only the reopener provisions, no other relief could be obtained against movants. The argument by Rohm and Haas must therefore fail, as movants have met their 12(b)(6) burden merely by force of the Decree, since their dismissal as parties would be subject to the Decree's reopeners.

While Rohm and Haas concede that dismissal "as to all claims resolved by the Decree may be appropriate," it argues that "a complete dismissal of all counterclaims and crossclaims is not." *Id.* But Rohm and Haas does not state which, if any, claims are not "Covered Matters" under the Decree. As noted above, the court can find no claims made by the non-settlors against movants that are not "Covered Matters," leaving only the indemnification claims, which we find are inextricably linked to the contribution claims barred by the statute and Decree.[4]

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4. Rohm and Haas may be arguing that the Decree does not resolve all claims against the *de minimis* settlors because the claims resolved under "Covered Matters" may be revived by force of the reopeners. But to state that a settled claim is subject to reopeners is different than stating that there are claims other than the settled claims that remain unresolved. Perhaps because Rohm and Haas argues that not all of the claims against the settlors have been resolved, it believes analysis of Rule 54(b) is

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Manor argues that dismissal of the *de minimis* settlors would cause "duplicative litigation." This is so because

> [t]he *de minimis* parties could watch the non-settling defendants litigate the cost-effectiveness of the remedy chosen by the United States, and then depending on the outcome, they could re-litigate that issue after the remedial costs had in fact passed the $94 million threshold.

Manor Brief at 2. This argument is no more than an attack on the structure of the *de minimis* settlement's reopener provisions, which anticipate that the occurrence of specified contingencies will reopen what is now settled. However, attacks on the propriety of the Decree, including arguments that the reopeners could lead to "duplicative litigation," have already been argued before the court and rejected in prior opinions. We need not address them again.

Finally, Manor argues that *de minimis* settlor CBS, Inc. "may have liability for the Chestnut Branch remediation that is separate from its alleged involvement with Almo and Lipari," because CBS itself discharged into Chestnut Branch from the same lagoon that was the source of liquids shipped by Almo to the Site. Manor Brief at 3. Thus, Manor argues that CBS contributed to the environmental harm to Chestnut Branch independently of the liquids it shipped by Almo to the Lipari Landfill. But Manor's brief does not instruct the court what import CBS's alleged pollution of Chestnut Branch

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appropriate, despite recognizing that movants do not seek relief under that rule. Since the court finds Rule 12(b)(6) to be dispositive on the motions, we need not and do not reach whether relief under Rule 54(b) would be available to movants, were they to invoke the rule.

should have, nor are we able to discern the relevance of this alleged fact to the motions before us.

Accordingly, the court will grant the motions by the *de minimis* settlors to dismiss all claims brought against them in this action by the non-settlors and dismiss the settlors as parties, all subject to the reopeners under section VI of the Partial Consent Decree.

The accompanying order has been entered.

Very truly yours,
John F. Gerry
Chief Judge